

HUMAN SERVICES BOARD

INTRODUCTION

FINDINGS OF FACT

2. When the petitioner was first registered in July 1999, she underwent a "pre-registration assessment" by the Department. As part of that assessment the petitioner specifically agreed to several items regarding safety and record keeping. One of the items on the Department's

checklist was: "Daily attendance records will be maintained and kept for 12 months."

3. An item of particular concern to the Department at that time was a large wood stove in an area that was accessible to children. In a written statement she provided to the Department at that time the petitioner stated: "The wood stove will not be in use during business hours."

4. In October 2002 a licensor from the Department visited the petitioner's day care in response to complaints the Department had received regarding certain health and safety concerns. After her inspection the licensor determined that the complaints that triggered the visit were "unsubstantiated". However, the Department's record of that visit includes notes of the following discussion between the licensor and the petitioner: "We discussed using a barrier around the wood stove if it is used during the day. . ."

5. On April 8, 2004, a Department licensor again visited the petitioner's home after receiving a complaint that the petitioner was providing care for too many children. Although this complaint was not substantiated, the licensor noted several violations regarding health, safety, and supervision, and ordered the petitioner to take immediate corrective action. These included a laundry basket blocking

egress through the front hall door. Also included in the list of violations were the findings that the petitioner "did not have any attendance records available for the month of April" and that the television was tuned into a news/weather program.

6. On July 22 2004, the Department's licensor again visited the petitioner's home following a complaint of unsafe behavior by the petitioner's child around the younger children in her care. Although the particular complaint was not substantiated the Department found several other safety violations and that the petitioner did not have attendance records for the children. On a "field form" she dated July 26, 2004, the petitioner certified that she had corrected the safety violations and the problem of daily attendance records as of July 22, 2004.

7. The licensor returned to the petitioner's home on July 28, 2004. The safety violations noted on July 22 had been corrected, but the petitioner again did not have daily attendance records for the children. On that date the petitioner signed another field form certifying that the Department had explained that she "could use any record system for attendance as long as it is maintained daily" and

that "(she) stated that she understands that she needs to record attendance daily".

8. After those visits the Department took no further action against the petitioner for the next year and a half.

9. On March 1, 2006, pursuant to Department policy, a Department licensor made a routine unannounced inspection visit to the petitioner's home. During her visit she noted the following:

- a. Daily attendance records were a week out of date.
- b. The wood stove was in use, hot to the touch, and unprotected from children who could pass by it.
- c. An open rabbit cage was in the children's play area, and on the floor around the cage and in places in the surrounding rooms were rabbit feces and food pellets.
- d. The petitioner's television was on and tuned to news programming.
- e. The kitchen counters and floor were dirty with full garbage bags accessible to the children.
- f. The petitioner used harsh language and tones in disciplining the children.
- g. Egress to the front hallway door was impeded by sleeping mats and toys.
- h. The petitioner ordered the licensor out of the house when the licensor questioned her about the rabbit feces.

10. After being ordered out of the petitioner's house the licensor called her supervisor and a coworker who is a

"complaint investigator" to report her findings. The investigator informed her that on that same day (March 1, 2006) the Department had received a telephone complaint that the petitioner had allowed a child to play inside a dirty rabbit cage.

11. The next day, March 2, 2006, the licensor and the investigator made an unannounced visit together to the petitioner's home. They found the following:

- a. The wood stove was in use, hot to the touch, and unprotected.
- b. Rabbit feces and food pellets were on the floor in the playroom and in the hallway, including under a child's sleeping blanket.
- c. The rabbit cage contained feces and urine and was in the play area, and the petitioner admitted children had been playing inside it.
- d. An exposed mop bucket with water was in the bathroom.
- e. A wastebasket in the bathroom was uncovered with a light bulb lying on top of its contents.
- f. Crying children were left unattended.
- g. The petitioner used harsh tones and discussed inappropriate matters in front of the children.

12. The investigators noted that several of the children in the petitioner's care were toddler aged and thus likely to crawl or play on the floor and put things in their mouths. At least one child was developmentally disabled.

13. On March 13, the Department sent the petitioner a notice informing her that it intended to revoke her day care registration effective April 14, 2006. The notice detailed the alleged violations of its regulations and specified the dates and findings pertaining to those violations.

14. At the petitioner's request, the Department conducted a "Commissioner's Review" of its proposed action. The review consisted of a meeting on April 26, 2006 at the petitioner's home with a "designee" of the Commissioner. Following that meeting the Department notified the petitioner, by letter dated May 30, 2006, that it was upholding its earlier decision to revoke the petitioner's registration.¹

15. In her testimony at the hearing (held on August 31, 2006) the petitioner did not directly dispute any of the investigators' observations listed in paragraphs 9 and 11, above.² She argued, however, that they were isolated and minor, and have been blown out of proportion by the Department.

¹ The petitioner has continued to operate her day care pending the resolution of this appeal to the Human Services Board.

² There were other violations noted by the investigators on those days (some of which the petitioner did dispute), but only those that were contained in the Department's May 30, 2006 Commissioner's Review letter have been cited and considered as part of this decision.

16. She stated that the sleeping mats and toys in the front hallway could have easily been pushed out of the way of the front door to allow prompt egress if necessary. She argued that having the TV on the weather channel is not inappropriate. She argued that the rabbit cage was "clean" and that the investigators "embellished" their report of rabbit feces and food pellets on the floor. She maintained that she usually keeps a clean and safe house and that (as, she said, "Murphy's Law" would have it) the investigators arrived at a particularly busy and stressful time for her in early March. She stated that she had an unusually high number of children that week, that the weather had turned cold (thus justifying the use of the wood stove), that a former employee had "stolen" her attendance book, and that her going to evening religious services (Ash Wednesday) had interfered with her ability to clean her house that evening (March 1, 2006). She stated that she feels she is the victim of a "lynching" by the Department and that she has been singled out for biased treatment.

17. At the hearing the petitioner expressed concern about the role of the Commissioner's "designee" in the Commissioner's review process and the fact that he was not present at the hearing. The petitioner states that when the

designee visited on April 26, 2006 she showed him a barrier for the wood stove she had ordered on or prior to March 1 (although she admits and does not contest that the designee determined that this particular barrier would be inadequate to protect the children). The petitioner maintains that she was led to believe by the Department that the designee was a "mediator" and that if she complied with his recommendations the Department would allow her to keep her registration. Following the hearing the petitioner moved for a "mistrial" on this basis.

18. Other than the petitioner's allegations, there is no evidence whatsoever that the Department ever committed itself to reversing its decision to revoke the petitioner's registration. At the hearing, the Department's Deputy Commissioner, the author of the May 30 Commissioner's Review letter, credibly testified that she had upheld the decision to revoke based on the specific recommendation to her by the "designee" who had been sent to the petitioner's home.³

19. The testimony by the licensor and the investigator who visited the petitioner's home on March 1 and 2, 2006 (see paragraphs 9-12, *supra*) is entirely credible. Both are well

³ She stated that she did not keep a written record of the designee's findings and recommendation.

trained and highly experienced in their roles. Neither had any perceivable bias against the petitioner. To the extent that the petitioner disputes any of their observations (which, as noted above, were more in degree and significance than actual direct disagreement), it is found not credible.

20. The licensor who visited on March 1, 2006 also testified that she orally expressed her concern about the wood stove to the petitioner during her visit that day. The petitioner denies that the licensor mentioned it. The hearing officer took this contention by the petitioner to indicate that the petitioner feels her use of the wood stove on March 2, 2006 had been somehow condoned by the licensor's silence on March 1. However, even if this conflict in testimony is resolved in the petitioner's favor, the facts remain that the petitioner ordered the licensor out of her house on March 1 before the licensor could fully discuss her observations, and that the petitioner had fully acknowledged the danger of using the wood stove several times in the past, and had certified to the Department that she would not do so.

21. In its Commissioner's Review letter the Department acknowledged, and at the hearing it did not contest, that several parents of children at the petitioner's day care, and others in her community, have spoken highly of the

petitioner's concern for the children in her care.⁴ The fact that in its "review" the Department may have been willing to discuss future compliance with the petitioner is evidence of its open-mindedness, rather than of any intent to mislead or unfairly punish her.

22. Based on the foregoing, it is found that the Department fairly and reasonably concluded that the petitioner has knowingly and repeatedly committed violations of the Department's regulations regarding the use of her wood stove and not keeping daily attendance records.

23. It is also found that the Department was reasonable in concluding that the petitioner is not sufficiently cognizant of and concerned with basic health and safety issues. Regardless of her overall ability to care for children, her judgement in allowing children access to an open rabbit cage and feces and food pellets in their play and sleeping areas speaks for itself. Even at the hearing, the petitioner expressed no contrition or indication that this may have been a problem.⁵

⁴ There is no claim or indication that any of these individuals are fully aware of all the Department's allegations in this matter.

⁵ Her only justification appears to be that it was too cold to keep the rabbit cage outside.

24. Although the petitioner testified that she felt the licensor "was running my day care down" when she confronted her about the rabbit feces, it cannot be found that there was any reasonable justification or excuse for the petitioner to have ordered the licensor out of her house during her March 1, 2006 visit.

25. In light of the foregoing, the Board need not make specific findings regarding the Department's additional "concerns" about other cleanliness issues, supervision, interaction and discipline, appropriate television programming, and egress as expressed in the May 30 Commissioner's Review letter. All of these issues would require at least some subjective analysis, and the Department's own witnesses indicated that these were not the licensors' primary concerns.⁶

ORDER

The decision of the Department revoking the petitioner's family day care registration is affirmed.

⁶ This is not to say that any factual dispute about any of these issues must be resolved in the petitioner's favor. It is only to note that if the petitioner successfully appeals the revocation of her registration based on the factual issues that the Board *has* addressed, the Department would then have to first determine whether the remaining issues, in and of themselves, would justify revocation. Under this unlikely scenario, fairness would dictate that the petitioner be allowed to address those issues in more detail and context than was afforded here.

REASONS

The Commissioner of the Department for Children and Families has the authority to adopt rules and regulations governing the day care registration program, including standards to be met and conditions for revocation of the Day Care Home Certificate. 33 V.S.A § 306(b)(1). Those rules and regulations are required by statute to be "designed to insure that children in . . . family day care homes are provided with wholesome growth and education experiences, and are not subjected to neglect, mistreatment or immoral surroundings." 33 V.S.A. § 3502(d). Such rules and regulations have been adopted and are found in the "Regulations for Family Day Care Homes". Furthermore, the Commissioner has the specific authority to revoke registrations "for cause after hearing" and to suspend registrations "in situations which immediately imperil the health, safety, or well-being" of children. 33 V.S.A. § 306(b)(3).

Among the regulations adopted by the Commissioner are the following:

DEFINITIONS

SERIOUS VIOLATION - A violation of group size, staffing requirements or any violation which immediately imperils the health, safety or well-being of children. Serious

violations may also include corporal punishment, lack of supervision, physical or sexual abuse or health and safety requirements.

SECTION I - ADMINISTRATION

7. Daily attendance records, listing dates of attendance for each child shall be kept on file for a period of at least 12 months.

SECTION V - HEALTH AND SAFETY

10. Children in care shall be protected from any and all conditions which threaten a child's health, safety and well being. This includes protecting children from stoves, pools, poisons, window covering pull cords, asbestos, wells, known vicious animals, medications, dust or chips from lead paint, traffic and other hazards.

. . .

20. Areas used by children shall be well lighted, well ventilated, clean, free from hazardous substances and sufficient in size to permit children to move about freely.

SECTION VI - RELATIONSHIP BETWEEN REGISTRANT AND
DIVISION OF LICENSING AND REGULATION

8. The applicant or registrant shall not interfere with, impede, deter, provide false information or cause another to do any of the aforementioned, or in any manner hinder the Department or its agent[s] in an investigation or inspection.

9. A violation of any section of the law or regulations regarding a Family Day Care Home may be cause for the revocation of the Registration Certificate.

. . .

11. When violations are found to exist, the Department may offer a registrant the opportunity to develop a

program improvement plan whereby the violations will be corrected within a time period specified by the Division. Such opportunity may not be provided when the violation poses risk of harm or is of repeated nature.

If the petitioner has violated any of the above regulations, the Commissioner has the authority to determine what action to take, including whether there is "cause" to revoke a day care registration certificate. 3 V.S.A. § 8814. The Board may only overturn such a decision if it finds that the Commissioner has acted arbitrarily, capriciously or has otherwise abused his discretion. See Huntington v. SRS, 139 Vt. 416 (1981), Fair Hearing Nos. 10,414, 12,804, 15,027, 15,430 and 16,485, and 18,036.

In this case, credible evidence shows that the petitioner violated all the above-cited regulations. Moreover, operating her wood stove and allowing rabbit feces on her floor can reasonably be viewed as constituting a "serious violation" as defined above. The use of the wood stove and her lack of attendance records can certainly be viewed as "of repeated nature". And ordering the licensor out of her house on March 1, 2006 can only be viewed as a flagrant and egregious violation of the requirement not to impede the Department's right to inspect and investigate her premises. At the hearing, rather than expressing contrition,

or acknowledging the legitimacy and seriousness of the Department's concerns, the petitioner's demeanor was defiant and insistent that she has been unfairly victimized.

Therefore, it must be concluded that the decision of the Department revoking the petitioner's day care registration is supported by the evidence and consistent with the pertinent statutes and regulations. Accordingly, the Board must affirm. 3 V.S.A. § 3091(d), Human Services Board Rule No. 17.

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